

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

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JENNIFER RICE and  
TROY BAKER,

Plaintiffs,

v.

CIV 00-1669 WJ/DJS-ACE

THE CITY OF SANTA FE, in its official capacity,  
and JOHN DENKO, in his individual capacity,

Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING**  
**DEFENDANTS' MOTION TO STRIKE**  
**DECLARATION OF FRANK NOVELLI REGARDING DKT. NO. 110**

THIS MATTER comes before the Court pursuant to Defendants' Motion to Strike Declaration of Frank Novelli [Docket No. 123]. Having considered the briefs of the parties, the Court finds that Defendants' motion shall be granted for the reasons explained below.

**BACKGROUND**

The declaration at issue is docketed as number 118, and was filed in support of a response docketed as number 110. The declaration was submitted by Mr. Frank Novelli. Plaintiffs notified Defendants that Mr. Novelli had been retained as an expert in this case. Plaintiffs also provided Defendants with an expert report under Fed. R. Civ. P. 26(a)(2)(B). The declaration of Mr. Novelli contains information that was not contained in the expert report. Plaintiffs contend that Mr. Novelli is a fact witness in addition to being an expert witness.

**DISCUSSION**

The declaration of Frank Novelli [Docket No. 118] contains primarily factual testimony in

the form of an affidavit. Defendants object to the entire declaration on the grounds that the information contained in the declaration was not included in the expert report of Mr. Novelli. Defendants also object to specific paragraphs of the declaration on various evidentiary grounds.

Defendants argue that Plaintiffs have violated Rule 26(a)(2)(B) by failing to timely disclose the information contained in Mr. Novelli's declaration in the form of an expert report. Plaintiffs respond that Mr. Novelli is a fact witness in addition to an expert witness, and that the information in the declaration is proper fact testimony by a lay witness. Even if this Court were to find that Mr. Novelli could act as a fact witness and an expert witness in this case, Plaintiffs did not disclose Mr. Novelli as a fact witness. On these grounds, the Court will grant Defendants' Motion to Strike. Because the Court grants the motion to strike on these grounds, the Court need not consider the specific evidentiary objections to specific paragraphs of Mr. Novelli's declaration. The Court notes, however, that if it accepted the declaration as fact testimony by a lay witness, it would strike those portions of the declaration not based on Mr. Novelli's personal knowledge in accordance with Fed. R. Civ. P. 56(e) and would strike any opinions or characterizations that are not proper lay opinion in accordance with Fed. R. Civ. P. 701.

## **CONCLUSION**

IT IS THEREFORE ORDERED that Defendants' Motion to Strike Declaration of Frank Novelli [Docket No. 123] is GRANTED for the reasons stated above.

A handwritten signature in black ink, appearing to be "C. R. Johnson", written over a horizontal line.

UNITED STATES DISTRICT JUDGE